

FCC FACT SHEET^{*}
Improving Competitive Broadband Access to Multiple Tenant Environments
Notice of Inquiry - GN Docket No. 17-142

Background: High-speed Internet access is an increasingly important gateway to jobs, health care, education, and information. The Chairman of the FCC has proposed a *Notice of Inquiry (NOI)* seeking comment on ways to facilitate greater consumer choice and to enhance broadband deployment in multiple tenant environments (MTEs), which are commercial or residential premises such as apartment buildings, condominium buildings, shopping malls, or cooperatives that are occupied by multiple entities and/or individuals. The Commission has previously prohibited providers from entering into or enforcing exclusive agreements to provide services to customers in commercial and residential MTEs. The *NOI* seeks comment on whether additional Commission action in this area is warranted to eliminate or reduce barriers faced by broadband providers that seek to serve MTE occupants.

What the NOI Would Do:

The NOI would seek comment on:

- Whether there are state and local regulations that may inhibit or have the effect of inhibiting broadband deployment and competition within MTEs, such as by preventing market entry or imposing overly burdensome infrastructure access requirements onto private companies.
- Whether the Commission should take any action regarding multichannel video programming distributors' (MVPDs') exclusive marketing and bulk billing arrangements within MTEs.
- How revenue sharing agreements and exclusive wiring arrangements between MTE owners and broadband providers may affect broadband competition within MTEs.
- Other contractual provisions and non-contractual practices that may impact the ability of broadband providers to compete in MTEs.

* This document is being released as part of a "permit-but-disclose" proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in GN Docket No. 17-142, which may be accessed via the Electronic Comment Filing System (<https://www.fcc.gov/ecfs/>).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Improving Competitive Broadband Access to) GN Docket No. 17-142
Multiple Tenant Environments)

NOTICE OF INQUIRY*

Adopted: "Insert Adopted Date"

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By the Commission:

Comment Date: [30 days after date of publication in the Federal Register]

Reply Comment Date: [60 days after date of publication in the Federal Register]

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I. INTRODUCTION

1. High-speed Internet access is an increasingly important gateway to jobs, health care, education, and information, allowing innovators and entrepreneurs to create businesses and revolutionize entire industries.1 In this Notice of Inquiry (Notice), we continue to explore ways in which we can

* This document has been circulated for tentative consideration by the Commission at its June open meeting. The issues referenced in this document and the Commission's ultimate resolution of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairman has determined that, in the interest of promoting the public's ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The FCC's ex parte rules apply and presentations are subject to "permit-but-disclose" ex parte rules. See, e.g., 47 C.F.R. §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission's meeting. See 47 CFR §§ 1.1200(a), 1.1203.

1 See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket

accelerate the deployment of next-generation networks and services and better enable innovation and competition in the market for high-speed Internet access.²

2. Specifically, we seek comment on ways to facilitate greater consumer choice and enhance broadband deployment in multiple tenant environments (MTEs). MTEs are commercial or residential premises such as apartment buildings, condominium buildings, shopping malls, or cooperatives that are occupied by multiple entities.³ Some argue that further Commission action addressing restrictive arrangements between broadband providers and MTEs is necessary to foster additional competition.⁴ Others contend that we should address through preemption excessive regulation that stifles broadband deployment and competition in MTEs.⁵ We recognize the importance of addressing these views and fostering competition and infrastructure investment in MTEs, and accordingly seek comment in this Notice on whether and how we should act.

3. The Commission previously has prohibited providers from entering into or enforcing exclusive agreements to provide services to customers in commercial and residential MTEs.⁶ In this

No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, FCC 17-37, at 2, para. 1 (Apr. 21, 2017) (*2017 Wireline Infrastructure Notice*).

² See, e.g., *id.*; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 17-38 (Apr. 21, 2017).

³ We note that when referring to residential MTEs, the Commission's rules and past Commission actions have used the term multiple dwelling unit, or MDU. See, e.g., 47 CFR § 76.800(a) (defining an MDU as a "multiple dwelling unit building (e.g., an apartment building, condominium building or cooperative)"); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20235, para. 1 (2007) (*2007 Exclusive Service Contracts Order*), *aff'd*, *National Cable & Telecommun. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009). We also note that the Commission has interpreted the term MDU to include "gated communities, mobile home parks, garden apartments, and other centrally managed residential real estate developments," and the Fourth Circuit Court of Appeals applied the Commission's MDU exclusivity prohibition to a homeowners association. *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20238, para. 7; see *Lansdowne on the Potomac Homeowners Ass'n v. OpenBand at Lansdowne, LLC*, 713 F.3d 187 (4th Cir. 2013) (*Lansdowne on the Potomac*). The Commission's rules prohibiting carriers from entering into exclusive agreements to provide telecommunications services to customers in MTEs employ the term "multiunit premises" to refer to commercial or residential premises occupied by multiple entities. See 47 CFR § 64.2501 (defining a "multiunit premises" as "any contiguous area under common ownership or control that contains two or more distinct units"). For purposes of this item, the term MTE refers to all of these entities collectively.

⁴ See Letter from Angie Kronenberg, Chief Advocate & General Counsel, INCOMPAS, to Marlene H. Dortch, Secretary, FCC at 4 (Feb. 13, 2017), <https://ecfsapi.fcc.gov/file/10213980822348/Ex%20Parte%20Letter%20for%20Chairman%20Pai%20Meeting%20on%20Feb.%209%2C%202017--Broadband%20Deployment%20Agenda.pdf> (INCOMPAS Feb. 13, 2017 *Ex Parte* Letter); ITTA – The Voice of Mid-Size Communications Companies (ITTA) Comments, MB Docket No. 16-247, at 9 (Sept. 21, 2016), <https://ecfsapi.fcc.gov/file/1092186801069/ITTA%20Comments%20on%20Video%20Competition%20Report%20PN%20FINAL%20092116.pdf> (ITTA Comments).

⁵ See Petition of the Multifamily Broadband Council (MBC) Seeking Preemption of Article 52 of the San Francisco Police Code, MB Docket No. 17-91, at ii-iii, 1-2 (filed Feb. 24, 2017), [https://ecfsapi.fcc.gov/file/10404438110416/MBC%20Preemption%20Petition%20\(2-24-17\)-c1%20\(002\).pdf](https://ecfsapi.fcc.gov/file/10404438110416/MBC%20Preemption%20Petition%20(2-24-17)-c1%20(002).pdf) (MBC Preemption Petition); see also *Media Bureau Seeks Comment on Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-91, Public Notice, DA 17-318 (rel. Apr. 4, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DA-17-318A1.pdf.

⁶ See *Promotion of Competitive Networks in Local Telecommunications Markets et al.*, WT Docket No. 99-217, CC Docket Nos. 96-98, 88-57, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No.

Notice, we seek comment on the state of broadband competition in MTEs and whether additional Commission action in this area is warranted to eliminate or reduce barriers faced by broadband providers that seek to serve MTE occupants.

II. BACKGROUND

4. *Previous Commission Actions.* As part of the Commission's efforts to foster competition in local communications markets pursuant to the Telecommunications Act of 1996, the Commission adopted the *2000 Competitive Networks Order*. This *Order* implemented several measures to ensure that competing telecommunications providers could provide services to customers in MTEs.⁷ More specifically, the order: (1) prohibited common carriers from entering into contracts that restrict or effectively restrict owners and managers of commercial MTEs from permitting access to competing common carriers in order to serve tenants; (2) clarified the Commission's rules governing control of in-building wiring and facilitated the exercise of building owner options regarding that wiring; and (3) concluded that the access mandated by Section 224 of the Communications Act of 1934, as amended (the Act)⁸ includes access to conduits or rights-of-way that are owned or controlled by a utility within MTEs.⁹

5. Several years later in the *2007 Exclusive Service Contracts Order*, the Commission concluded that exclusive agreements to provide multichannel video programming distributor (MVPD) services to customers in multiple dwelling units (MDUs) harm competition and broadband deployment, and prohibited cable operators and others subject to the relevant statutory provisions from entering into or enforcing such agreements.¹⁰ The following year, in an effort to promote regulatory parity, the Commission, in the *2008 Competitive Networks Order*, also restricted telecommunications carriers from executing or enforcing exclusive agreements in residential MTEs.¹¹

99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983, 22985, para. 1 (2000) (*2000 Competitive Networks Order*); *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20236, para. 1; *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Report and Order, 23 FCC Rcd 5385, 5386, para. 5 (2008) (*2008 Competitive Networks Order*).

⁷ See *2000 Competitive Networks Order*, 15 FCC Rcd at 22985, para. 1.

⁸ See 47 U.S.C. § 224.

⁹ See *2000 Competitive Networks Order*, 15 FCC Rcd at 22985, para. 1. The Order also prohibited most restrictions on the ability of parties with a direct or indirect ownership or leasehold interest in property, including tenants in MTEs, to place antennas one meter or less in diameter used to receive or transmit any fixed wireless service in areas within their exclusive use or control. See *id.*

¹⁰ See *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20236, para. 1; see also *2008 Competitive Networks Order*, 23 FCC Rcd at 5386, para. 5. The *2007 Exclusive Service Contracts Order* was subsequently affirmed on appeal, with the D.C. Circuit concluding “that the Commission acted well within the bounds of both Section 628 and general administrative law” in prohibiting exclusivity agreements between cable operators and owners of MDUs. *NCTA*, 567 F.3d at 661. Section 628 applies to entities affiliated with common carriers, such as DIRECTV, which is a subsidiary of AT&T. See 47 U.S.C. § 548(j); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Second Report and Order, 25 FCC Rcd 2460, 2474-5, paras. 40-41 (2010) (*2010 Exclusive Service Contracts Order*) (holding that a “private cable operator” affiliated with a common carrier is subject to the building exclusivity prohibition).

¹¹ See *2008 Competitive Networks Order*, 23 FCC Rcd at 5386-87, para. 5 (finding that, in an environment of increasingly competitive bundled service offerings, “the importance of regulatory parity is particularly compelling in our determination to remove this impediment to fair competition,” and that there was nothing in the record that supported denying residential users “the competitive benefits that commercial customers enjoy by virtue of the [*2000 Competitive Network Order*]’s prohibition” of exclusive contracts in the commercial context).

6. The Commission subsequently released the *2010 Exclusive Service Contracts Order* to address the issues of exclusive marketing and bulk billing arrangements between MVPDs and MDUs raised in the Notice of Proposed Rulemaking attached to the *2007 Exclusive Service Contracts Order*.¹² The Commission defines an exclusive marketing arrangement as an arrangement, either written or in practice, between an MDU owner and an MVPD that gives the MVPD, usually in exchange for some consideration, the exclusive right to certain means of marketing its service to residents in the MDU.¹³ Typically, this includes advertising in the MDU's common areas, placement of the MVPD's brand on the MDU building's web page, placement of the MVPD's brochures in "welcome packs" for new residents, sponsoring events on the premises of the MDU, and slipping brochures under residents' doors.¹⁴ Bulk billing is "an arrangement in which one MVPD provides video service to every resident of an MDU, usually at a significant discount from the retail rate that each resident would pay if he or she contracted with the MVPD individually."¹⁵ In the *2010 Exclusive Service Contracts Order*, the Commission chose not to prohibit MVPDs from using bulk billing arrangements, concluding that such arrangements predominantly benefit consumers through reduced rates and operational efficiencies and by enhancing deployment of broadband.¹⁶ The Commission also declined to prohibit MVPDs from using exclusive marketing arrangements, finding that it could not, based on the record, conclude that such arrangements significantly hinder or prevent other MVPDs from providing service to MDU residents.¹⁷ At the same time, the Commission reserved the right to re-examine one or both of these practices in the years ahead if warranted by changes in marketplace conditions and their effect on consumers.¹⁸

7. *Statutory Basis for Previous Commission Action.* The Commission has previously found that Sections 201(b) and 628 of the Act provide statutory authority to prohibit the execution and enforcement of anti-competitive contractual arrangements granting common carriers and covered MVPDs exclusive access to MTEs.¹⁹ Section 201(b) of the Act expressly authorizes the Commission to regulate all "charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service," to ensure that such practices are "just and reasonable."²⁰ In the *2008 Competitive Networks Order*, the Commission found that a carrier's execution or enforcement of an exclusive access provision within an MTE is an "unreasonable practice," and that the Commission thus has "ample authority" under Section 201(b) to prohibit such exclusivity provisions in the provision of telecommunications services.²¹ Section 628 makes it unlawful for a cable operator or common carrier that provides video programming by any means directly to subscribers "to engage in unfair methods of

¹² See *2010 Exclusive Service Contracts Order*, 25 FCC Rcd at 2461, para. 1.

¹³ See *2010 Exclusive Service Contracts Order*, 25 FCC Rcd at 2471, para. 30.

¹⁴ See *id.*

¹⁵ *2010 Exclusive Service Contracts Order*, 25 FCC Rcd at 2461, para. 3.

¹⁶ See *id.* at 2461, para. 2.

¹⁷ See *id.* at 2462, para. 3.

¹⁸ See *id.* at 2462, para. 4.

¹⁹ 47 U.S.C. §§ 201(b), 548(b), (j).

²⁰ 47 U.S.C. § 201(b).

²¹ See *2008 Competitive Networks Order*, 23 FCC Rcd at 5391, paras. 14-15 (citing 47 U.S.C. § 201(b)); see also 47 U.S.C. § 254(b)(3) (detailing the Act's overarching commitment to universal service and ensuring consistently competitive and diverse telecommunications service regardless of demographics); 47 U.S.C. § 257(b) (charging the Commission with protecting competition in telecommunications markets, stating that "the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity").

competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing . . . programming to subscribers or customers.”²² In the *2007 Exclusive Service Contracts Order*, the Commission held that it had “ample authority under Section 628(b) of the Act to adopt rules prohibiting cable operators from executing or enforcing contracts that give them the exclusive right to provide video programming services (alone or in combination with other services) to MDUs”²³—a determination upheld by the D.C. Circuit.²⁴ Thus, the Commission’s existing rules prohibit both the execution and enforcement of any contractual provisions granting cable operators and common carriers exclusive access to MTEs.²⁵

8. *Competitive Barriers in the MTE Marketplace.* As recently as 2016, parties such as INCOMPAS and ITTA have alleged that competitive fixed and mobile broadband service providers continue to face challenges in expanding their service footprint because of various contractual arrangements in the MTE marketplace.²⁶ Smaller ISPs have also alleged that certain non-contractual arrangements achieve the same anticompetitive end result as, for example, the prohibited exclusive service arrangements.²⁷

9. At the same time, some providers argue that certain state regulations intended to encourage competitive MTE access may actually hinder their ability to provide a competing service. For instance, in a separate proceeding, the Multifamily Broadband Council (MBC) argues that some measures aimed at promoting competitive MTE access may have the perverse effect of stifling broadband competition by privileging large, well-financed network providers over smaller ones which may be unable to enter into certain contractual terms (for example, undisturbed use of inside wiring²⁸ or bulk billing arrangements) that may be necessary to secure the financing needed to deploy networks to multi-tenant buildings.²⁹ Specifically, MBC has asked the Commission to preempt a San Francisco, California ordinance requiring MTE owners to permit competing broadband providers to use existing wiring in the MTE upon request from an occupant.³⁰

III. DISCUSSION

10. With an eye towards both promoting competition and easing deployment of broadband services within MTEs, we seek comment on a variety of issues regarding the provisioning of competitive

²² 47 U.S.C. § 548(b), (j).

²³ *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20254, para. 40.

²⁴ *NCTA*, 567 F.3d at 666 (concluding “that Section 628(b) authorizes the Commission’s action” in the *2007 Exclusive Service Contracts Order*).

²⁵ See 47 CFR § 76.2000 (prohibiting exclusive video programming service contracts in MDUs); 47 CFR § 64.2500 (prohibiting common carriers from entering into or enforcing exclusive service contracts in MTEs).

²⁶ See INCOMPAS Feb. 13, 2017 *Ex Parte* Letter at 4; ITTA Comments at 9.

²⁷ Interview by Chris Mitchell, Community Broadband Bits Podcast, with Charles Barr, President, Webpass, and Lauren Saine, Policy Advisor, Webpass (Apr. 12, 2016), transcript available at <https://muninetworks.org/content/transcript-community-broadband-bits-episode-197> (discussing non-contractual practices between MTE owners and providers that, according to Mr. Barr, “basically creat[e] exclusive agreements physically”).

²⁸ An arrangement to obtain undisturbed use of inside wiring occurs when the property owner of an MTE agrees to grant a communications provider exclusive use of designated wiring within an MTE. See MBC Preemption Petition at 3-4.

²⁹ See MBC Preemption Petition at ii-iii, 1-2.

³⁰ See *id.* at ii-iii.

broadband services within MTEs. We also seek comment on the Commission's jurisdictional and statutory authority for addressing MTE access issues.

11. *State and Local Regulatory Barriers.* As part of our ongoing efforts to facilitate broadband deployment and competition, we seek comment on whether there are state and local regulations that may inhibit or have the effect of inhibiting broadband deployment and competition within MTEs. Some have argued that certain local regulations effectively limit broadband competition in MTEs by inhibiting market entry and foisting infrastructure access requirements onto private companies.³¹ To the extent that state and local regulations inhibit broadband deployment in MTEs, what form do such regulatory barriers most often take? Do such infrastructure access mandates have the effect of reducing investment in new infrastructure or discouraging maintenance of existing infrastructure? How is the quality of service to consumers affected by these policies? Commenters are encouraged to provide examples of specific statutes and regulatory measures that hinder broadband deployment and competition within MTEs.

12. *Exclusive Marketing and Bulk Billing Arrangements.* We seek comment on whether we should revisit the Commission's decision in the *2010 Exclusive Contracts Order* not to take action regarding MVPDs' exclusive marketing and bulk billing arrangements.³² Recently, INCOMPAS has alleged that some of these practices adversely affect competition in the MTE market.³³ How prevalent are these arrangements in the market? What are the typical terms of these arrangements? Are certain provisions included in contracts between providers and MTE owners more often than others? Does the size of an MTE affect whether certain provisions are included in the contract? How, specifically (including any examples), do these provisions affect broadband competition, if at all? Do exclusive marketing and bulk billing arrangements hinder competition in the MTE market? If so, we seek comment on any circumstances that may have changed since the Commission concluded that "bulk billing arrangements predominantly benefit consumers, through reduced rates and operational efficiencies, and by enhancing deployment of broadband."³⁴ Would restricting exclusive marketing and bulk billing arrangements help to encourage competition within MTEs without stifling deployment efforts? Or would prohibiting these arrangements have the effect of increasing prices to consumers? Would prohibiting these arrangements lead to additional competition sufficient enough to avoid or outweigh potential price increases? If we decide that regulations are warranted, should those rules apply to all carriers, to all broadband providers, or just to MVPDs that are subject to Section 628 of the Act?

13. *Revenue Sharing Agreements.* We seek comment on how revenue sharing agreements are affecting broadband competition within MTEs. Such agreements entail a carrier agreeing to pay a *pro rata* share of the revenue generated from the tenants' subscription service fees, and in many cases, a "door fee" to the MTE owners to have access to the MTE.³⁵ How are these agreements structured, and what are their typical terms? How frequently are these agreements used in the marketplace? How commonly are they included in agreements with residential MTEs compared to commercial MTEs? Do these agreements affect the price MTE tenants ultimately pay for service, and if so, in what way? Are these arrangements problematic only if they are exclusive, or even if more than one carrier is able to enter into them? Does the size of an MTE affect whether these provisions are included in the contract? Are the

³¹ See *id.*

³² See *2010 Exclusive Service Contracts Order*, 25 FCC Rcd at 2461-62, paras. 2-3.

³³ See INCOMPAS Feb. 13, 2017 *Ex Parte* Letter at 4.

³⁴ *2010 Exclusive Service Contracts Order*, 25 FCC Rcd at 2461, para. 2.

³⁵ See *Broadband Now, Apartment Landlords Are Holding Your Internet Hostage* (July 14, 2016), <http://broadbandnow.com/report/apartment-landlords-holding-internet-hostage/>. "Door fees" are arrangements in which an MTE owner charges a fee for broadband providers to provide services within a building, and generally take the form of revenue sharing, although flat rates for access are also common. See *id.*

agreements negotiated strictly between MTE owners and broadband Internet access service providers, or are intermediaries involved? If commenters assert that intermediaries are involved, we encourage them to describe the types of intermediaries. Do such agreements have an impact, either positive or negative, on the level of broadband competition within MTEs? We seek comment on how to best address revenue sharing agreements in a way that will promote competitive provider access to MTE markets without hindering deployment. The submission of specific examples, substantiated by cost-benefit analyses, and other factual or quantitative evidence is particularly encouraged.

14. *Exclusive Wiring Arrangements.* We also seek comment on how exclusive wiring arrangements are affecting the level of broadband competition within MTEs. Under Section 76.802(a) of the Commission's rules, after a customer has ceased purchasing service from a provider, incumbent cable operators are required to make unused wiring available to others before removing it.³⁶ INCOMPAS has alleged that MTE building owners purchase that inside wiring and then lease back the idle wiring exclusively to the incumbent cable operator, leaving competitors with the choice of either installing duplicative wiring in residential units or not serving the building at all.³⁷ We seek comment on the prevalence of this practice. What are the typical terms of these agreements? Do these lease agreements typically involve granting exclusive rights to the wiring? Are there ways exclusive access rights could be offered initially to multiple carriers, such as through a competitive bidding process, that would assuage concerns with exclusive arrangements? How do the exclusive wiring agreements differ from exclusive service agreements, which prevent competitors from gaining access to MTE tenants? How can these agreements be reconciled with Section 76.802's prohibition on using ownership interest in property located on the subscriber's side of the demarcation point to prevent alternative service providers from accessing the "home run" wiring?³⁸ If exclusive wiring arrangements are stifling competition in MTEs, how can the Commission address them without discouraging deployment within such markets? Conversely, do these arrangements promote competition, and if so, how?

15. *Other Contractual Provisions and Practices.* We also seek comment on whether there are other types of contractual provisions and non-contractual practices, besides the ones mentioned above, that impact the ability of broadband providers to compete in MTEs.³⁹ If so, what are these provisions and/or practices, and how do they impact competition within MTEs? Are any complained-of practices already prohibited by our rules?

16. *Legal Authority.* Finally, to the extent that commenters urge the Commission to address any of these various issues, we seek input on the jurisdictional and statutory basis for doing so. In prohibiting exclusive service arrangements within MTEs, the Commission has previously relied on

³⁶ See 47 CFR § 76.802(a).

³⁷ See INCOMPAS Feb. 13, 2017 *Ex Parte* Letter at 4; see also ITTA Comments at 9 (noting that this access is "required by law to ensure that consumers in apartment buildings and similar places can obtain video service from a competing provider").

³⁸ 47 CFR § 76.804.

³⁹ For example, in *Lansdowne*, a property owner granted an exclusive easement to an MVPD. See *Lansdowne on the Potomac*, 713 F.3d at 187. The Commission filed an amicus brief with the court arguing that the exclusive easement was tantamount to a contract that granted an MVPD exclusive access, and therefore was prohibited under the Commission's bar on contractual terms giving a cable operator the "exclusive right to provide any video programming service (alone or in combination with other services) to a MDU." *Id.* at 204 (citing 47 CFR § 76.2000). The court agreed with this reasoning, declaring the easement null and void and enjoining its enforcement. See *id.*, at 207-208.

Sections 201(b) and 628 of the Act.⁴⁰

17. We seek comment on these statutory provisions and our authority to facilitate broadband deployment and competition within MTEs. Section 628 focuses on actions by cable operators and common carriers that provide video service that “hinder significantly or [] prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.”⁴¹ In the *2007 Exclusive Service Contracts Order*, the Commission recognized that the business model for competitive entrants was a triple-play bundle of video, broadband, and telephone, and that “[a]n exclusivity clause in a MDU’s agreement with a MVPD denies all these [competitive] benefits to the MDU’s residents.”⁴² Is this still the case, and if so, do the issues listed above hinder significantly or prevent MVPD competition (as opposed to just broadband competition)? Can we act under Sections 201(b) and 628 to facilitate broadband competition within MTEs, just as we have previously acted pursuant to these statutes to facilitate competition for telecommunications and video services within MTEs?

18. We also seek comment on the extent to which Section 253 of the Act can serve as a basis for the Commission to address state or local regulations with respect to facilities deployment and competition in MTEs. Section 253(a) generally provides that no state and local legal requirements “may prohibit or have the effect of prohibiting” the provision of interstate or intrastate telecommunications services,⁴³ and provides the Commission with “a rule of preemption” that “articulates a reasonably broad limitation on state and local governments’ authority to regulation telecommunications providers.”⁴⁴ In the *2017 Wireline Infrastructure Notice*, we proposed that under Section 201(b) and Section 253, we have the authority to engage in a rulemaking to adopt rules that further define when a state or local legal requirement or practice constitutes an effective barrier to the provision of telecommunications service under Section 253(a).⁴⁵ Are there rules we should adopt pursuant to Section 253 to address state and local regulations that may expressly prohibit or have the effect of prohibiting the provision of telecommunications services in MTEs? Does Section 253 establish limits on the ability of a state or local authority to require that facilities be made available to competing providers? When would such state or local regulation prevent or have the effect of preventing deployment of telecommunications services? Are there other preemptive actions we should take under our Section 253 authority to promote the deployment of next-generation networks and services to MTEs? To the extent certain facilities are used exclusively for interstate services, e.g., for ISP-bound traffic, what is the appropriate role for states over such facilities?

⁴⁰ 47 U.S.C. §§ 201(b), 548. See, e.g., *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20254-55, 20260, paras. 40, 51; *2008 Competitive Networks Order*, 23 FCC Rcd at 5391-93, paras. 15-19; *2010 Exclusive Service Contracts Order*, 25 FCC Rcd at 2462-63, paras. 5-8. We note that these and other decisions in this area—which we discuss above—pre-dated the agency’s 2015 decision to classify broadband as a Title II telecommunications service. We thus believe that the Commission has authority to take action with respect to the physical facilities that providers seek to deploy within MTEs.

⁴¹ 47 U.S.C. § 548(b), (j).

⁴² *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20245, para. 19. See also *id.* at 20257, para. 46 (citing a commenter who argued that “because the deployment of broadband networks and the provision of video service are intrinsically linked, exclusivity clauses that prevent it from providing video services compromise its ability to deploy other advanced telecommunications services, by inhibiting its ability to market a package of services that consumers demand and reducing the revenues it needs to support investment in new and innovative services”).

⁴³ 47 U.S.C. § 253(a).

⁴⁴ *Level 3 Commc’ns L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 531-32 (8th Cir 2007) (Level 3).

⁴⁵ See *2017 Wireline Infrastructure Notice*, FCC 17-37 at 35, para. 109.

19. Are there other sources of authority on which the Commission may rely to prevent parties from entering into any agreements and contractual provisions on which this Notice seeks comment and which are deemed to be anticompetitive? If so, which types of agreements may we prohibit and why? We also seek comment on the constitutional implications, if any, of addressing such agreements.

20. We also seek comment on the potential impact of our proposed reclassification of broadband Internet access service as an information service on our legal authority to address broadband deployment and competition within MTEs.⁴⁶ In the event that we decide to reclassify broadband as an information service, can we continue to rely on Title II of the Communications Act insofar as the facilities at issue tend to carry non-broadband telecommunications services—for instance, traditional voice services? In addition, are there sources of authority within or outside Title II under which we could promote broadband competition among Internet service providers (ISPs) that provide services in MTEs but are not subject to Section 628? What sources of statutory authority other than Section 628, if any, would enable us to prohibit non-cable ISPs from executing or enforcing anti-competitive arrangements? How should Section 706 of the Telecommunications Act of 1996 inform our efforts?⁴⁷ Would creating additional rules to regulate anticompetitive MTE-related arrangements for one set of ISPs within MTEs create a regulatory disparity between those ISPs and other ISPs? If so, what might be the competitive consequences of such a regulatory disparity?

21. *Other Actions.* What other actions should the Commission take to promote competitive entry into MTEs? For example, should it encourage cities or states to adopt model codes that promote competitive access to MTEs? If so, what arrangements should those model codes prohibit or mandate? Should the Commission facilitate the compilation of best practices regarding competitive entry to MTEs? What data and analysis would be most useful to state and local decision makers when considering policies that may promote or hinder competitive access to MTEs?

IV. PROCEDURAL MATTERS

A. *Ex Parte* Rules

22. This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.⁴⁸ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with Rule 1.1206(b). In proceedings governed by Rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in

⁴⁶ See *Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking, FCC 17-60, at 8, para. 24 (May 23, 2017).

⁴⁷ See 47 U.S.C. § 1302.

⁴⁸ 47 CFR. §§ 1.1200 *et seq.*

this proceeding should familiarize themselves with the Commission's *ex parte* rules.

B. Filing of Comments and Reply Comments

23. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.
- People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

C. Contact Person

24. For further information about this proceeding, please contact John Visclosky, FCC Wireline Competition Bureau, Competition Policy Division, Room 5-C111, 445 12th Street, S.W., Washington, D.C. 20554, (202) 418-0825, John.Visclosky@fcc.gov.

V. ORDERING CLAUSE

25. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1, 2(a), 4(i), 4(j), 201(b), 202, 303(r), 403, 601(4), 601(6), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 154(j), 201(b), 202, 303(r), 403, 521(4), 521(6), and 548, and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302, this Notice of Inquiry IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary